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BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 646 (Sub-No. 1)

RAIL RATE CHALLENGES IN SMALL CASES

POST-HEARING

SUPPLEMENTAL COMMENTS OF

THE DOW CHEMICAL COMPANY

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**POST-HEARING SUPPLEMENTAL COMMENTS OF
THE DOW CHEMICAL COMPANY**

The Dow Chemical Company LLC ("Dow") hereby submits supplemental comments in response to certain issues raised at the January 31, 2007 hearing in the above-captioned proceeding. Dow desires to address comments made by Vice Chairman Buttrey toward the close of the hearing that perhaps the Board has improperly focused its attentions on "small cases" instead of "small shippers."

Although shippers and railroads have long debated whether the Board should focus on small cases versus small shippers, Dow believed that debate had been put to rest at page 35 of the July 28, 2006 decision that initiated this proceeding, in which the Board rejected the small shipper focus when it noted that "under the statute eligibility must be based on the value of the case." From the reactions of the railroad witnesses at the hearing, and from the absence of this debate in the content of the railroad comments, it is clear that the railroads too had understood this issue to have been resolved in favor of a small case focus. There is no reason to reopen this debate.

Moreover, the very first subject that Dow addressed in its oral testimony was the fact that, although it is a large shipper, Dow has small cases, and thus Dow is among the captive shippers that Congress intended to protect through the small case process. Despite this testimony, Dow received no questions from the Board on this subject at the hearing.

The predicate for Vice Chairman Buttrey's comments was that large shippers may not need regulatory rate protection because of their size and resources. But, the relative size and resources of a captive shipper have nothing to do with a railroad's ability to exercise market power over that shipper. Indeed, if that were true, most coal shippers would not need regulatory protection. But, neither Congress nor anyone else has suggested that a coal shipper's size should determine the availability of regulatory rate protection, and neither should shipper size be relevant in small cases.

One interpretation of Vice Chairman Buttrey's comments might be that large shippers who have the resources to litigate full stand-alone cost ("SAC") cases should be required to do so. That reasoning, however, ignores the substantial differences between the repetitive flow of unit train coal traffic and the constantly changing routes of predominantly carload traffic tendered by shippers such as Dow. Most of Dow's traffic moves a single car at a time over multiple routes and to hundreds of destinations that can change as often as annually. Compared to coal traffic, the volumes on each route are significantly less, the routes and destinations are subject to constant change, and the service is far less frequent. Consequently, *the value of a rate case* for Dow, even at extremely high R/VC ratios, seldom if ever will justify the cost of bringing a SAC case. These facts comport directly with the statutory standard for small case eligibility. Instead of asking whether Dow *could* afford the cost of SAC litigation, the statute asks whether Dow *would* incur the cost given the value of its case.

Dow's size and resources do not provide leverage for better rail rates, especially in today's rail markets. Most of Dow's largest production facilities in North America are captive to a single railroad, the Union Pacific, which serves Dow at Freeport, Texas; and Plaquemine and Taft, Louisiana. Furthermore, today's capacity-constrained railroads have very little incentive to offer better rates on captive traffic in order to win competitive traffic that they neither need nor want. Thus, even assuming that threats to remove some traffic volume from a railroad have ever been a credible option for large shippers, capacity constraints have insulated railroads from such threats in today's rail markets.

Moreover, in order for traffic even to be competitive, *both* the origin *and* destination must have dual rail service. Board precedent is clear that, if *any* segment of a route is captive, the monopoly railroad will reap monopoly rents for the *entire* route, even if all other segments are competitive. *See Burlington Northern Inc.—Control and Merger—Santa Fe Pac. Corp.*, 10 I.C.C. 2d 661, 747-57 (1995), *aff'd sub nom. Western Resources, Inc. v. STB*, 109 F. 3d 782 (D.C. Cir. 1997). Thus, in today's rail market, where mergers have resulted in two major railroads in the eastern and western halves of the country, very little traffic has truly competitive rail service, since very little traffic is served by two railroads at *both* origin and destination.

These same facts and circumstances also neutralize any realistic threat of geographic competition. In theory, geographic competition could take two forms: (1) by Dow shifting traffic to another Dow origin facility served by another railroad, or (2) by a potential traffic shift to a non-Dow origin served by a different railroad. But, due to the small number of Class I railroads left in this country, the chances are very good that, if a railroad does not handle the traffic from one Dow facility, that same railroad still will handle the traffic volume either at another Dow origin, at the origin facility of a Dow competitor, or at the destination. In such cases, the railroad is unlikely to lose any traffic volume. Thus, the potential for Dow to gain any leverage from geographic competition is negligible, even compared to smaller shippers.

Ultimately, a market dominant railroad possesses monopoly power over large and small shippers equally. Both are subject to the same competitive abuses, and if either wants to reach their customers, they most often must do so by the market dominant railroad or not at all. It makes no more sense for Dow to spend money on a SAC case than it does for a small shipper to do so when the value of the case does not justify the expenditure. The fact that Dow may have the ability to pay for a small case, while a smaller shipper may not, does not alter this fact.

Furthermore, Dow's size relative to any Class I railroad does not give it any advantage over a smaller shipper. Because Dow must reach its customers by rail, or not at all, a market dominant railroad can inflict substantial economic harm and inefficiencies upon Dow by reason of unreasonably high rates. As a monopolist, a market dominant railroad will attempt to price Dow's traffic at a level that will transfer Dow's profits to the railroad, without a corresponding investment by the railroad in Dow's business. This is an inefficient and improper transfer of wealth that regulation is intended to prevent. In addition, the railroad, rather than the competitive marketplace, ultimately would determine which customers Dow can serve and by what means, thereby distorting the free market's more efficient allocation of resources.

While Dow's very ability to transact business with a customer is dependent on a market dominant railroad, in no case can Dow have a similar influence upon any Class I railroad. Thus, to deny Dow the benefits of regulatory rate protection on its "small cases" merely because it is a "large shipper" would do violence to the statute and Congressional intent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of February, 2007, served a copy of the foregoing Comments on all parties of record, by first class mail, postage prepaid.

Kimberly Murray